United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

To be argued by
George W. F. Cook

Docket No. **75-1053**

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee

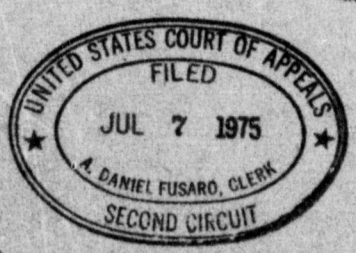
v.

ERNEST HARVEY, JR.,

Appellant

Appeal from the United States District
Court for the District of Vermont

BRIEF FOR THE UNITED STATES



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BRIEF FOR THE UNITED STATES

STATEMENT OF THE CASE

Ernest Harvey, Jr. appeals from a judgment of conviction entered on February 10, 1975, after a six day trial before the Honorable Albert W. Coffrin, United States District Judge, and a jury.

An indictment, bearing Criminal No. 74-62 and filed June 25, 1974, charged Ernest Harvey, Jr. and co-defendant Gerald L. Dunham, also known as Gary Dunham,

in six counts as follows: Count I charged conspiracy to transport stolen property in interstate commerce (18 U.S.C. §2311), to transport and receive stolen dynamite (18 U.S.C. §842(h)), and to transport and receive in interstate commerce dynamite with the knowledge and intent that it would be used unlawfully to damage and destroy property (18 U.S.C. §844(d)) in violation of 18 U.S.C. §371;

Count II charged transportation and receipt in interstate commerce with knowledge and intent that it would be used to damage and destroy property in violation of 18 U.S.C. §844(d);

Count III charged interstate transportation and receipt of dynamite by convicted felons in violation of 18 U.S.C. §842(i)(1) and 844(a);

Count IV charged receipt, concealment and transportation of dynamite knowing it was stolen in violation of 18 U.S.C. §842(h);

Count V charged carrying dynamite during the commission of a felony prosecutable in a court of the United States in violation of 18 U.S.C. §844(h); and

Count VI charged a conspiracy to injure, oppress, threaten and intimidate Byron Nutbrown III, in the free exercise of the right and privilege, guaranteed by the Constitution and laws of the United States, to give information to the proper authorities concerning violations of federal law, and which conspiracy resulted in his death, in violation of 18 U.S.C. §241.

The trial of Ernest Harvey, Jr.* began on October 21, 1974 and on October 28, the jury returned a verdict of guilty on all counts (except Count V which was dismissed with the Government's consent at the close of the evidence)(Tr. 865 - 66)**

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* On September 30, 1974, defendant Dunham entered pleas of guilty to Counts I and II and of nolo contendre to Count VI. On March 3, 1975, Dunham was sentenced to imprisonment as follows: Count I - five years; Count II - 10 years consecutive to the sentence on Count I; and Count VI - life imprisonment concurrent with the sentence on Counts I and II. On June 9, 1975, the District Court reduced Dunham's prison sentence on Count VI to 45 years and directed that he be eligible for parole under 18 U.S.C. §4208(a)(2) at such time as the Board of Parole in its discretion may determine.

** Tr. refers to the transcript of the trial; other references are as follows: DB - Defendant's Brief; GX - Government Exhibits; R - the record on appeal as indexed [for example (R. 55 p. 109), refers to page 109 of the transcript of September 20, 1974, which is item number 55 of the record on appeal.]

STATEMENT OF ISSUES

STATEMENT OF FACTS

In a light most favorable to the Government, the jury could have found the following facts:

Defendant Ernest Harvey, Jr., now age 36, met Government witness George Kiblin, now age 33, some time in 1971 in the State of New Hampshire (Tr.459). During 1972 and 1973, Harvey resided at 153 Church Street, Barre, Vermont with his wife, Shirley (Tr. 253, 255, 459). During November, 1972, George Kiblin went to live with Harvey at his Barre, Vermont home for a period of time (Tr. 459).

Harvey's co-defendant, Gerald (Gary) Dunham, now age 24, at all times material herein resided with his wife, Averill Dunham in Williamstown, Vermont, which is located just south of and adjacent to Barre, Vermont (Tr. 750). George Kiblin also lived with the Dunhams in Williamstown for a period of time during late August and September of 1973 (Tr. 515).

George Kiblin's home town was Newport, New Hampshire where he resided in 1973 (Tr. 461). Newport, New Hampshire is about 100 miles south of the Barre-Williamstown, Vermont area (Tr. 470).

Sometime prior to August 3, 1973 George Kiblin had discussions with defendant Ernest Harvey regarding a plan to burglarize Lavalley's Lumber Yard in Newport, New Hampshire (Tr. 461). Kiblin knew the set up at Lavalley's since it was in his home town and he had scouted Lavalley's office both during working hours and when it was closed (Tr. 462, 536).

On August 2, 1973, Ernest Harvey telephoned George Kiblin at Kiblin's home in Newport, New Hampshire (Tr. 463). Kiblin's stepfather answered the phone. When Kiblin came to the phone he recognized it was Harvey (Tr. 464). Kiblin and Harvey agreed that they could commit the burglary at Lavalley's on the following night, Friday, August 4, 1973 (Tr. 464). Kiblin explained the size of the safe to Harvey and told Harvey that "alot of firepower" (meaning explosives or dynamite) would be needed to get into Lavalley's safe (Tr. 464). Harvey said that "he would be <u>down</u> Friday night" and that he (Harvey) would take care of all the needed firepower (explosives or dynamite)(Tr. 464). In a second phone call from Harvey to Kiblin later the same night, Harvey told Kiblin that Gary Dunham would be coming with Harvey the next night (Tr. 465), and Harvey again confirmed that he would bring enough firepower (Tr. 466).

Also, on that evening, or prior thereto, Kiblin had had conversations with Harvey in which he informed Harvey that they would get "about ten thousand dollars, at least, in cash" from the Lavalley job (Tr. 466). Kiblin didn't remember any talk as to how the prospective ten thousand dollars would be split, because "it always had been in the past, equal shares" (Tr. 466).

Byron Nutbrown III, a 15-year old boy and a citizen of the United States (Tr. 251), was a freshman in Spaulding High School in Barre, Vermont in 1973, and resided with his mother, Barbara Nutbrown, and several brothers and sisters at their home at 27 1/2 Granite Street, Barre, Vermont (Tr. 248). Byron, nickname Buster, had known Ernest Harvey, Jr. since 1968 (Tr. 250). In time past, Harvey had played the role of a father to Byron and his younger brother, Raymond, and among other things, had taken the boys camping and on a trip to Pennsylvania (Tr. 250). Difficulty arose, however, between Mrs. Nutbrown and Harvey in 1970 when Mrs. Nutbrown acted as a police informer against Harvey (Tr. 848 - 54). This resulted in Harvey being convicted of burglarizing a home containing antiques in the Sugar Hill area of New Hampshire (Tr. 850).

Around 6:00 P.M. on August 3, 1973, Barbara Nutbrown drove her son Byron to Ernest Harvey's home in

Barre which took about five minutes by car (Tr. 253). Byron had arranged to go camping with Harvey (Tr. 253). Byron took his sleeping bag, knife and walkie-talkie radio with him (Tr. 253). Sometime later, Mrs. Nutbrown dropped Byron off at Harvey's home (Tr. 253). Harvey was fixing the fog light on his car (Tr. 253).

At about 9:30 P.M., some three hours later the same night, August 3, 1973, Kiblin received a phone call from Harvey. Kiblin was again at his mother's home in Newport, New Hampshire (Tr. 467). Harvey told Kiblin that he was "in town" and everything was "all set," and that Harvey would pick up Kiblin right off (Tr. 467). Shortly thereafter, Harvey drove in the yard of Kiblin's home in Harvey's green 1964 Plymouth Starlight (Tr. 467) with Vermont plates (Tr. 469). Seated in Harvey's car was Gary Dunham on the passenger side of the front seat, and Byron Nutbrown III in the back seat (Tr. 468). Kiblin knew both Dunham and Nutbrown.

Kiblin immediately let Harvey know that he was disturbed because Byron Nutbrown had been brought along (Tr. 468). Harvey said Byron could act as a lookout with his two-way radio (Tr. 468). Kiblin again insisted that he did not want Nutbrown along on the "break-in" (Tr. 468).

After some discussion, Harvey suggested that they go for a ride and talk it over as Harvey did not want to sit in the Newport door yard with Vermont plates on his car (Tr. 469). Kiblin then got in Harvey's car and Harvey, Kiblin, Dunham and Nutbrown went for a drive, during which they gassed up the car and bought some beer (Tr. 469).

The four then drove past Lavalley's Lumber Yard, went to the Pines Restaurant, decided it was too crowded there, and finally ended up at an A & W Root Beer stand, (Tr. 469, 470), where they had something to eat. While at the A & W stand, there were further discussions between Harvey and Kiblin as to whether they would call off the Lavalley job because of Byron Nutbrown's presence (Tr. 470, 471).

Finally, Harvey insisted that "they had come over a hundred miles" (undoubtedly referring to the distance between Barre, Vermont and Newport, New Hampshire) and that Harvey wanted to do the job that night, and that he, Harvey, would "take the responsibility on himself" for Byron Nutbrown because Harvey had brought Byron along (Tr. 471).

At this point of time at the A & W stand, while Harvey, Kiblin and Dunham were seated in the front seat of Harvey's car, and Nutbrown in the back seat, Harvey

stated he would "take all the repercussions" and "he said that if anyone of us got caught, we were never going to sign a statement anyway, but in Buster's (Nutbrown's) case, he said that by taking on the responsibility of having him with him, that if he ever signed a statement or ever said anything, he'd kill him" (Tr. 471). Then Harvey turned to Buster Nutbrown in the back seat and said the same thing to Buster, and Buster said he wouldn't say anything (Tr. 471).

At about midnight on August 3, the foursome drove past Lavalley's Lumber Yard again to a nearby gravel pit (Tr. 472). Harvey took various burglary tools out of the trunk of his car, including an ax, a sledge hammer, a crow bar, a piece of rope, an extension cord and an electric drill (Tr. 473). Lastly, Harvey gave Kiblin a paper bag of explosives, which Harvey said he had stolen from a granite shed (Tr. 473). Harvey kept the dynamite caps for use in detonating the dynamite (Tr. 474). Kiblin did not know anything about explosives, and followed Harvey's instructions regarding the handling of the dynamite (Tr. 473, 474). Harvey then gave instructions to the four, namely, that Buster Nutbrown and Kiblin would man the two-way radios, with Nutbrown serving as a look-out (Tr. 476). Dunham was to stay in Harvey's car, using the two-way radio

in Harvey's car, to stay in touch with the others, (Tr. 477), and also operate the police radio broadcast scanner so that Dunham could alert the others of police activity (Tr. 477). After giving instructions, Dunham dropped Harvey, Kiblin and Nutbrown off at Lavalley's Lumber Yard, and returned to the gravel pit (Tr. 478). Nutbrown was sent toward town to watch out for police activity, and Kiblin and Harvey headed toward the back of Lavalley's to attempt to break in to crack the safe (Tr. 478).

Harvey then proceeded up a ladder placed against the building containing the safe at Lavalley's and cut some wires (Tr. 479). A short time later, apparently while Harvey and Kiblin were still on the ladder, Newport policeman Michael Patten arrived at the scene, having been directed to do so, along with another policeman, Thomas Myncaywor, following a police alarm which had been set off when the wires were cut by Harvey (Tr. 138, 140).

Patten drew his handgun and yelled "police officers - stop or I'll shoot", or words to that effect (Tr. 140, 480). Both Harvey and Kiblin attempted to run fron the scene (Tr. 480). Harvey ran within ten feet of Officer Pacten, who got a good look at Harvey under the security lights at Lavalley's, but Harvey managed to get away (Tr. 156, 184, 480, 481). Kiblin also ran, but was

injured when he ran into a truck, and Patten was able to arrest Kiblin (Tr. 144, 145).

Shortly thereafter Officers Patten and Mynczywor were directed to go to the home of a man residing near Lavalley's. There they found Byron Nutbrown (Tr. 149). The Officers placed Nutbrown in a patrol car and proceeded to the gravel pit where they found Gary Dunham waiting in Harvey's car (Tr. 152, 153). Officers Patten and Mynczywor then transported Byron Nutbrown to the police station where Nutbrown gave a statement to the police (GX 5) which generally implicated all four in the burglary. (This statement was admitted, not for the truth of the facts asserted therein, but solely as it demonstrated that Nutbrown had knowledge of and was a potential witness to federal crimes. This proof was offered and received only as to Count VI, the civil rights conspiracy count, in which it is essential to prove a motive or specific intent to interfere with Nutbrown's right to testify as to federal crimes. The District Court immediately gave a proper limiting instruction.)

In the early morning hours of August 4, 1973, Mrs. Barbara Nutbrown received a telephone call at her home in Barre, Vermont from the Newport, New Hampshire police (Tr. 254). Mrs. Nutbrown then went by Harvey's house in

Barre, at 3:00 A.M. to inform Harvey's wife that "the boys were in trouble" in New Hampshire and that she had to drive to New Hampshire to pick up her son (Tr. 255). Harvey was not at his home (Tr. 256). At 6:00 A.M. on the morning of August 4, 1973 Mrs. Nutbrown met Byron at the Newport police station (Tr. 258). Byron was wearing Ernie Harvey's jacket and was still carrying his walkie-talkie radio (Tr. 258). The Nutbrowns returned to Barre at about 8:30 A.M., dropped off Harvey's jacket with his wife, and picked up Byron's sleeping bag (Tr. 259). Harvey was still not at home (Tr. 259).

On August 5, 1973, Byron told his mother that after returning from Newport, New Hampshire, Byron had gone over to the Harvey residence where Shirley Harvey, Harvey's wife, and Averill Dunham, Dunham's wife, and Byron had loaded a motorboat motor, a chain saw and some tools, and some dynamite, into Mrs. Dunham's car, and then transported it in the car to the East Montpelier River, where it was thrown over the bank (Tr. 262, 263, 754). (Nutbrown's statement again was admitted solely for the purpose of showing Nutbrown's knowledge or state of mind with regard to facts relevant to Count VI of the indictment, and not for the truth of the facts. The jury was again so instructed (Tr. 262, 263). Harvey told Kiblin that he had arranged to have this evidence disposed of in the river (Tr. 496).

On August 6, 1973, Byron was interviewed by Detective Ronald West of the Barre Police Department. Byron told Officer West that he had left Barre, Vermont about 8:40 P.M. on August 3, 1973 with Harvey and Dunham, that they travelled to Newport, New Hampshire and picked up Kiblin, that on the way down to Newport, Harvey remarked that he had blown a door off a safe in the past, that Nutbrown did not actually see the dynamite as everything was in the trunk of Harvey's car, that Harvey and Kiblin attempted the break-in, that the police arrived, and that Byron ran from the scene (Tr. 416). (This evidence also was again admitted as bearing on Count VI alone, and a similar limiting instruction was given)(Tr. 416).

Byron Nutbrown was also interviewed by Vermont State Police Sergeant Lawrence Wade, who had accompanied Detective Ronald West (Tr. 313). This second interview covered the same facts as West's interview with Nutbrown. In substance, Byron Nutbrown told Wade that he and Gary Dunham were driven to Newport, New Hampshire by Harvey on the evening of August 3, 1973, that they picked up Kiblin in Newport, that Nutbrown was dropped off as a look-out for police, that Byron then went to a nearby house and phoned his mother who phoned the police, that the police later picked him up and eventually his mother picked him

up (Tr. 317). (This testimony was also admitted only on Count VI and a limiting instruction was given.)

About August 7, 1973, some three days after Kiblin was arrested, Harvey, Dunham and Kiblin were in custody together at the Sullivan County Jail in New Hampshire (Tr. 488). Each was in custody awaiting a probable cause hearing on the State charges relating to the burglary (Tr. 488 - 502). Harvey and Kiblin discussed the situation. They were watching to see if Byron Nutbrown would show up at the State probable cause hearing (Tr. 500). Harvey figured that if there was any signed statement in the hands of the police implicating Harvey, it had to come from Nutbrown. Harvey was interested in whether Kiblin got caught with the dynamite, and Kiblin told Harvey that both he, Kiblin and Dunham, thought that a police officer from Vermont who was at the jail had the dynamite in his possession (Tr. 491). Harvey and Kiblin also discussed possible charges (Tr. 492). Kiblin styled himself as an expert in the law relating to State and Federal charges (Tr. 494, 604, 605). Kiblin told Harvey that the State could prosecute for possession of explosives, and the Federal government could prosecute because "interstate transportation" of explosives was a "federal offense" (Tr. 492). In Kiblin's language ". . . if we

ever got caught with a Vermont car and we'd come down from Vermont and was pulling a burglary in New Hampshire and we got caught with explosives, we had a Federal problem" (Tr. 493). Further, ". . . if Buster Nutbrown had signed a statement and where was (sic) the explosives being a Federal offense, they had real problems, because from the understanding Harvey gave me, that Byron knew exactly where those came from (referring to the explosives)" (Tr. 499). Referring to Nutbrown, Harvey told Kiblin "that had (sic, they had) a problem they had to take care of it." (Tr. 499). The officers at the jail to which Kiblin referred were Officer Raymond Jacobs of the Barre Town Police Department and Detective Ronald West of the Barre City Police Department (Tr. 406). Officer Jacobs later testified that there were a number of granite quarries in Barre, Town, that the companies involved in these quarries store dynamite, and that it was the policy of his Police Department tc notify the Federal authorities, including the F.B.I., of cases involving stolen dynamite (Tr. 405).

Nutbrown did not appear at the State of New Hampshire probable cause hearing. The charges against Harvey and Dunham were dropped because Nutbrown did not did not appear (Tr. 503, 562). Harvey told Kiblin he

figured everything was over, but Kiblin said they could get indictments (Tr. 502). Harvey and Dunham were released from custody when the charges were dropped, and shortly thereafter Kiblin made bail (Tr. 503).

On August 17, 1973, Mrs. Nutbrown went over to Harvey's house because Byron had been getting (threatening) phone calls and "was scared." Harvey said: "Buster had nothing to worry about, that he would never harm him. He said I love Buster too much. . ." (Tr. 265).

However, around the end of August, 1973, (Tr. 507), Kiblin received a phone call from Harvey and Harvey asked to see Kiblin (Tr. 507). Kiblin was in Newport, New Hampshire, which is about fifteen miles due east of Ascutney, Vermont (Tr. 136). Harvey wanted Kiblin to come over to the Top Hat Bar in Ascutney because Harvey did not want to drive his Vermont car into New Hampshire, which had been the scene of the arrests (Tr. 500). Kiblin said he couldn't get a ride to Ascutney, but a short time later, Harvey and Dunham picked him up in Dunham's car and took Kiblin over to the Top Hat Bar in Ascutney (Tr. 508). After some conversation at the Top Hat, Harvey left for his home in Barre (Tr. 509). Before leaving, Harvey told Dunham and Kiblin to be sure to get up to Williamstown, Vermont (Dunham's home) by 10:30 P.M. that night (Tr. 509).

After Harvey's departure for Barre, Dunham and Kiblin continued to drink at the Top Hat in Ascutney (Tr. 511). Eventually, they drove up to Dunham's house in Williamstown, but did not arrive there until midnight (Tr. 511). Some time later the same night Harvey drove into the driveway of Dunham's house (Tr. 511). Harvey was mad because Dunham and Kiblin had not gotten to Williamstown at exactly 10:30 P.M. as Harvey had directed (Tr. 511). Harvey told Dunham and Kiblin that he (Harvey) had had Buster Nutbrown with him at 10:30 P.M. and if Dunham and Kiblin had been there at 10:30 P.M. "we would have got rid of his problem" (Tr. 511) meaning that "they was going to get rid" of Nutbrown (Tr. 511).

Kiblin argued with Harvey that getting rid of Nutbrown was nothing Kiblin should get involved in - Kiblin "didn't want no part of it. I didn't even want to know about it" (Tr. 512). Kiblin went on to say "I was caught for burglary on the spot, there was no way I could beat it; Buster Nutbrown's statement, if he had signed one, couldn't do a thing to me" (Tr. 512). Thereupon, Harvey told Kiblin that he was to stay with Dunham in Williamstown until Harvey got ahold of Nutbrown again (Tr. 512). Kiblin asked "why", and Harvey told him that Kiblin was going to be there "to pick that car up when they needed it" (Tr. 513).

Kiblin understood from Harvey's instructions to him that "it was either do it or that would be it for me too" (Tr. 513). Harvey also told Dunham to take Kiblin for a ride and show him where to pick up the car (Tr. 513).

There was also discussion among Harvey, Dunham and Kiblin that "they had to do this to protect themselves from the Federal charges that could come up on the explosive part, and that the only real evidence they had against him was Buster" Nutbrown (Tr. 514). They weren't much interested in the State charges as they wouldn't "get much time for that anyways" (Tr. 514).

Following this incident around the end of August, 1973, Kiblin continued to live with Dunham in Williamstown (Tr. 515). The next day after the meeting with Harvey in Dunham's driveway, Dunham drove Kiblin to an abandoned house on a dirt road leading to Chelsea, Vermont, where Dunham had something to say about the house (Tr. 515). Except for returning to Newport for one day on either September 4 or 5, Kiblin stayed continuously at Dunham's house in Williamstown from the end of August through September 8, 1973 (Tr. 516).

At 12:00 noon on September 8, 1973, Barbara Nutbrown, Byron's mother, saw Ernest Harvey park his car in front of the Dunkin Donuts store in Barre (Tr. 266).

Mrs. Nutbrown and Byron were sitting on the porch (Tr. 266). Byron told his mother he was "leaving now" to go bike riding with Ernest Harvey (Tr. 266). Mrs. Nutbrown gave Byron some money, kissed him good-bye, and saw Byron go over to Dunkin Donuts, saw him get into Harvey's car and Harvey and Byron drove off toward Barre City (Tr. 267, 268). That was the last time Mrs. Nutbrown saw her son (Tr. 267).

Late in the day on Saturday, September 8, 1973, Dunham received a phone call (Tr. 516). Shortly after the phone call, Mrs. Averill Dunham drove Dunham and Kiblin to a point on the dirt road near the abandoned house (Tr. 516, 751). She let Dunham and Kiblin out of the car and they proceeded on foot to the abandoned house (Tr. 516, 517). It was still daylight. A short time later, Harvey drove up in his car (Tr. 517). Harvey had Nutbrown with him (Tr. 518). Harvey drove in back of the abandoned house, told Kiblin to get a piece of plastic and a couple of shovels out of the trunk (Tr. 519). Kiblin did so, got in Harvey's car and drove off (Tr. 519). As Kiblin was leaving, he noticed that Harvey and Dunham had "ahold of Byron", and that Harvey had his arm around Byron's throat (Tr. 519).

Kiblin drove around a short while and ended up visiting at Bill Blondin's house in Chelsea (Tr. 520). Kiblin's presence at the Blondin residence with Harvey's

car during this time was confirmed by independent witnesses (Tr. 741 - 749). After staying there for about two hours, Kiblin returned to the abandoned house after dark, between 8:00 and 9:00 P.M. (Tr. 522). Harvey and Dunham were there, Kiblin stopped for them, Harvey took the car keys and opened up the trunk and threw something in it (Tr. 522). Harvey then got in the car and started driving (Tr. 523). Harvey told Kiblin that "the problem was over" (Tr. 523). A short time later Harvey let Dunham out of the car and told Dunham to get rid of Nutbrown's clothes (Tr. 523, 524).

Thereafter, Harvey drove to his home in Barre with Kiblin, picked up Harvey's wife, Shirley, returned to Dunham's house where they picked up Dunham, his wife and infant child. Then all six people drove Kiblin down to Claremont, New Hampshire (Tr. 525). Harvey only took Kiblin as far as Claremont because "he wanted to get back home as soon as possible" (Tr. 525).

The following morning, September 9, 1973, Barbara Nutbrown discovered that Byron had not returned home from Harveys (Tr. 269). At about 10:00 A.M., Mrs. Nutbrown went over to Ernest Harvey's and told him that "Buster did not come home" (Tr. 270). Harvey told her he had let Byron out in front of the Barre Post Office at 4:00 P.M. the day before, and that Byron had started to hitchhike toward East Barre

(Tr. 271). Mrs. Nutbrown then reported the situation to the Barre Town Police (Tr. 271).

Byron did not return home. Mrs. Nutbrown returned to Harveys and told him the situation (Tr. 273). Harvey "never offered to go look for the boy." "He said he didn't know where he was and that was that" (Tr. 273).

On June 20, 1974, George Kiblin appeared before a Federal Grand Jury in Rutland, Vermont and testified to his role in the use of dynamite in the August 4, 1973 burglary and his involvement thereafter with Byron Nutbrown (Tr. 616).

On June 26, 1974, several F.B.I. agents and officers of the Vermont State Police proceeded to the abandoned house on the dirt road leading from Williamstown to Chelsea (Tr. 356). At a point about 200 yards to the rear of the abandoned house there appeared to be a recent grave (Tr. 419). The earth was removed to a depth of about five feet, and the nude body of a boy was removed, which was later identified from dental records as being Byron Nutbrown (Tr. 652). The medical examiner, based on an autopsy, concluded that death was due to mechanical asphyxia, "that is, there was mechanical interruption of the respiration of the body." (Tr. 635).

ARGUMENT

POINT I

PROOF OF BYRON NUTBROWN'S OUT OF COURT STATEMENTS WAS ADMISSIBLE TO SHOW THE STATE OF MIND AND KNOWLEDGE OF BYRON NUTBROWN AS A POTENTIAL FEDERAL WITNESS TO SATISFY A CRUCIAL ELEMENT OF COUNT VI OF THE INDICTMENT.

Count VI of the indictment charged defendant Harvey with conspiring to violate the civil rights of Byron Nutbrown III by injuring and oppressing Nutbrown in a right secured by the Constitution of the United States, namely, the right and privilege to give information to the proper authorities concerning violations of federal law, 18 U.S.C. §§371, 2314, 842 and 844.

An essential element of Count VI was proof that Byron Nutbrown had knowledge, and was of a state of mind, to become a witness to Federal offenses. Whether Byron Nutbrown's out of court statements, showing his knowledge or state of mind, were true or not, was not an issue in offering the statements.

The offered statements consisted of three oral declarations by Nutbrown to Officer Mynczywor, Officer

West, and Mrs. Barbara Nutbrown, plus a written statement (GX 5). Collectively, the statements showed that Nutbrown purportedly possessed knowledge relevant to Harvey's violation of federal law involving dynamite and interstate transportation of stolen property.

Prior to offering the out of court statements, the Government clearly limited its offer solely for the purpose of proving knowledge (Tr. 223). The District Court was also informed that the declarations of Nutbrown were not offered for the truth of the facts asserted therein, but merely to show the knowledge or state of mind of Nutbrown, regardless of the truth or falsity of the facts contained in the declaration. The District Court tnen admitted the declarations and statement for the limited prupose of showing the knowledge of Byron Nutbrown regarding facts relevant to Count VI (Tr. 230).

The oral declarations of Nutbrown, and his written statement (GX 5), were properly admitted as relevant to prove the state of mind of Nutbrown. McCormick on Evidence (2d Ed. 1972). See, 249 pp. 588 - 592. Dean McCormick notes: "this circumstantial non-assertive use of utterances to show state of mind is perhaps most clearly applicable to declarations evincing knowledge, notice,

consciousness, or awareness of some fact, which fact is established by other evidence in the case." Id. at 591.

In a recent civil rights conspiracy case under 18 U.S.C. §241, Anderson v. United States, 417 U.S. 211 (1974), the Supreme Court addressed itself to the very question here involved. In Anderson, the Supreme Court approved of the admission of out-of-court statements which were offered solely to show that the statements were made and not for the truth of the same. The Supreme Court stated:

> The obvious question that arises in the present case, then, is whether the out-of-court statements of Tomblin and Browning were hearsay. We think it plain that they were not. Out-of-court statements constitute hearsay only when offered in evidence to prove the truth of the matter asserted. (Citing V J. Wigmore, Evidence §1361 [3d Ed. 1940]; C. McCormick, Law of Evidence 460 (1954)).

A recent case directly in point on the facts and law is United States v. DeCarlo, 458 F.2d 358 (3d Cir. 1972). That case involved a prosecution under 18 U.S.C. §892 and 894, prohibiting extortinate credit transactions. A major element of the crime charged is proof that there is an understanding between creditor and debtor at the time credit is extended, that delay in making repayment could result in the use of violence. (Id. at 365). Defendant

DeCarlo had extended credit to one Saperstein. Saperstein was not alive during the trial, having died from arsenic poisoning. The trial court admitted into evidence a letter which Saperstein had written to the F.B.I., explaining that he and his family had been living under death threats from DeCarlo because of Saperstein's failure to make timely payments. The trial court admitted the letter as relevant to show Saperstein's state of mind, and solely for that purpose. In an en banc decision, the Third Circuit Court of Appeals noted:

> Hearsay is traditionally defined as an unsworn, out-of-court statement offered in court for the truth of the matter stated. See e.g., V J. Wigmore, Evidence §1361 (3d Ed. 1940). Testimony relating to the state of mind of the out-of-court declarant, on the other hand, is generally not hearsay because, although the declaration is unsworn and given out of court, it is not offered for the truth of the matter stated. Doubtless, a number of out-of-court statements could have value both for the truth of the matter they contain and for the state of mind of the declarant. The Saperstein letter is such a statement.
>
> Had the letter been admitted for the truth of its assertions, it would have tended to show that Saperstein was beaten on September 13th and in fact owed DeCarlo and Cecere a sum of money. It would have fallen then within the definition of hearsay, and would not have been admissible unless it came within one of the recognized exceptions to the hearsay rule. However, it was not offered for the truth of the matter stated.

The Third Circuit Court of Appeals further went on to point out that there was no prejudice to the defendant where the proof was offered solely for the limited purpose, and a proper limiting instruction was given.

It is submitted that the District Court's decision in admitting the Nutbrown statements was proper under the authorities of Anderson and DeCarlo, supra. While Second Circuit authorities are not factually close to the present case, the principle that out-of-court declarations may be admitted when not offered to prove the truth of the statement, but merely that the statement was made, is well recognized in Second Circuit opinions: See, United States v. Press, 336 F.2d 1003, 1011 (2d Cir. 1964) and United States v. Frank, 494 F.2d 145, 155 (2d Cir. 1964). Further, in the present case, there can be no argument of prejudice since proof of knowledge of facts attributable to Nutbrown were also proven by witnesses subject to cross examination.

Accordingly, for the reason that the Nutbrown out-of-court declarations were [redacted] offered to show the state of mind, and because proper limiting instructions were given by the District Court, no error was committed in admitting the declarations.

Also, it should be noted that although well aware of the existence and contents of Nutbrown's statement (See Point II, B., infra.), and the Government's intention to offer it, (R. 32), Harvey never moved for a severance of Count VI from Counts I through V.

Defendant further argues that the statements should not have been admitted because there was a question of voluntariness, since Nutbrown had not received Miranda warnings, etc. Clearly, this is a frivolous argument, and there is no need to cite authority that defendant Harvey has no standing to make this argument.

POINT II

THE COURT PROPERLY RECEIVED EVIDENCE OF DYNAMITE THEFTS IN THE BARRE, VERMONT AREA AND OF THE CIRCUMSTANCES OF HARVEY'S PRIOR FELONY CONVICTION.

Harvey argues that the District Court improperly admitted the following evidence:

1. Testimony by Barre Town Police Officer Raymond Jacobs that there were numerous granite quarries in the Barre area from which dynamite had been stolen; and

2. Testimony of Mrs. Barbara Nutbrown concerning her role in the arrest and conviction of Ernest Harvey in Sugar Hill, New Hampshire.

The Jacobs testimony was relevant to Count VI in that it established the likelihood that Nutbrown's statements would have led to federal prosecution. Mrs. Nutbrown's testimony was admissible because Harvey's examination of her opened the door and created an unfair impression.

The Government called Police Officer Raymond Jacobs to establish that there were numerous granite quarries in the Barre area and that his Department frequently received reports of thefts of dynamite from such quarries. Jacobs testified that it was the practice of his Department to refer such reports to the federal authorities

responsible for investigating dynamite matters (Tr. 405-406). This proof was offered and received for the purpose of establishing that in the normal course Nutbrown's statements concerning the theft, interstate transportation and alleged use of dynamite would have resulted in federal prosecution.

In addition, there was no suggestion, based on Jacobs' testimony, that Harvey was responsible for these dynamite thefts. Accordingly, Harvey was not harmed by its admission.

Harvey also argues that Barre City Police Officer Ronald West should not have been permitted to testify about Byron Nutbrown's statements to West. These statements included a report that Harvey told Nutbrown that Harvey had used dynamite in the past to blow up a safe. As discussed in Point I, supra, this testimony was not offered for its truth but merely to establish Nutbrown's knowledge as a potential witness to federal crimes.

Harvey also argues that Barbara Nutbrown's testimony of the facts and circumstances leading to Harvey's arrest and conviction for burglary in New Hampshire should not have been admitted. First, Harvey's previous conviction was an essential alleged element of Count III. During the

jury selection, Harvey's counsel told the jury of the conviction (Tr. 52). The Government introduced proof of the conviction, but without any background information (Tr. 302 - 03; GX 7).

Mrs. Barbara Nutbrown testified during the Government's direct case to essentially uncontested facts. See Point III, C., infra.) During the defense case, Harvey recalled Mrs. Nutbrown and suggested that Mrs. Nutbrown had been criminally involved in the same burglary but had escaped prosecution solely because her father was a police officer and because she had devised the burglary as a scheme to get Ernie Harvey (Tr. 844 - 848).

The impression left by Harvey's examination of Mrs. Nutbrown was totally false and unfair. As a result, the District Court permitted the Government to elicit from Mrs. Nutbrown that in 1970 Harvey had come to her house with property stolen from Sugar Hill, New Hampshire and told her that he was going back for more. Harvey also asked Mrs. Nutbrown to come along. Mrs. Nutbrown thereupon telephoned her father, a police officer, who took her to the Barre Police Station. There, Mrs. Nutbrown was instructed to go along with Harvey when he returned to steal the remaining property in New Hampshire. Mrs. Nutbrown did as she was instructed and Harvey was arrested by New Hampshire police

authorities at the scene of the burglary (Tr. 848 - 853).

Clearly, the District Court was correct in permitting Mrs. Nutbrown to explain her involvement in the Sugar Hill burglary. In any event, because the conviction for that offense was already in evidence, Harvey was not harmed by that proof.

POINT III

THE DISTRICT COURT PROPERLY EXCLUDED HEARSAY STATEMENTS OFFERED FOR THE TRUTH OF THEIR CONTENTS.

Harvey argues (DB 23 - 25) that the District Court should have admitted two hearsay statements he offered for the truth of their contents. The argument misconstrues the law and is totally without merit.

First, Harvey argues that the District Court should have permitted Sergeant Lawrence Wade, Vermont State Police, to testify that co-defendant Dunham denied that Harvey ever travelled to Newport, New Hampshire with him.* The expressed purpose of the offered proof was to contradict Newport, New Hampshire Police Officer Michael Patten who testified that he saw Harvey at the scene of the burglary of Lavalley's Lumber Yard (Tr. 336, DB 23). It

*At the time of trial, Dunham was under indictment in Criminal No. 74-63 for making the same false denial, among others, before the Grand Jury which investigated this case. On March 3, 1975, Dunham admitted Harvey came to Newport, New Hampshire with him, pleaded guilty and was sentenced to five years imprisonment concurrent with the sentence in Criminal No. 74-62.

was thus clearly offered for the truth of its contents and consequently inadmissible.

Second, Harvey argues that the District Court should have permitted Sharon Houle, a friend of Byron Nutbrown III, to testify that Nutbrown was "sick and tired of being required to stay at home all the time, that he was tired of babysitting and that he was planning to run away . . . (and) get into big trouble so that he could get into Weeks School (a juvenile facility in Vergennes, Vermont, maintained by the Vermont Department of Corrections)" (Tr. 781 - 82).

The purported relevance of this proof is not set forth in Harvey's brief. At the trial, however, the proof was offered to contradict somehow Nutbrown's statements about the Newport, New Hampshire burglary which had been offered by the Government, and to show that Nutbrown had run away and was still alive (Tr. 783)(of doubtful probative value in light of the medical examiner's identification of Nutbrown's body from dental records).

The District Court properly indicated that any statements which would contradict or impeach directly Nutbrown's statements would be admitted but that the offered statements had no connection with Nutbrown's knowledge of federal crimes (Tr. 782). The District Court

also permitted Miss Houle to testify to her personal knowledge and observations of Nutbrown's home situation and how he was treated there, thus permitting Harvey to argue as he did, that Nutbrown had run away and was not the recovered body (Tr. 928 - 35).

The sole basis now urged for the admissibility of the excluded proof that "Defendant should have been permitted to show hearsay that is exculpatory" (DB 25). The cases cited, Ferguson v. Georgia, 365 U.S. 570, 602 (1961) and United States v. Freeman, 302 F.2d 347, 351 (2d Cir. 1962), cert. denied, 375 U.S. 958 (1963), provide not the slightest support for such a novel proposition.

Hearsay rules apply equally to both the prosecution and the defense and the statements offered by Harvey for the truth of the matters asserted therein were properly excluded.

POINT IV

THERE IS NO BASIS FOR THE GRANTING OF A MISTRIAL.

Harvey argues that a mistrial should have been granted on three separate grounds. The arguments are frivolous.

A. JURY SEQUESTRATION

The first ground argued is that it was error for the District Court not to sequester the jury. Harvey never formally moved to have the jury sequestered. At pre-trial hearings on September 20, 1974, a month before trial began, the District Court initiated the question and asked for counsels' views on sequestration. Counsel for co-defendant Dunham stated he would "urge upon the Court that the jury be sequestered during the trial," and counsel for Harvey stated he would "join in that." (R. 55, p. 109). The District Court did not rule but stated the matter is "within the discretion of the Court and something I will have to take under consideration." (R. 55, p. 112). Harvey never again mentioned sequestration until after the verdict was returned.

No request for sequestration was made during jury selection when the jurors would normally be advised and examined concerning the personal difficulties involved and no objection was ever made when the Court excused the jury each day (Tr. 218, 394, 590, 767, 953). After the verdict was returned, when Harvey moved for a mistrial based on the fact that the jury was not sequestered, the District Court quite naturally inquired whether Harvey had ever asked to have the jury sequestered and then denied the motion (Tr. 999).

Because Harvey failed to request adequately the sequestration of the jury and because he never objected to the procedures followed during the trial, the issue has not been preserved for this Court. United States v. Indiviglio, 352 F.2d 276 (2d Cir. 1965)(en banc), cert. denied, 383 U.S. 907 (1966).

In any event, Harvey has never demonstrated any prejudice which resulted from the fact that the jury was not sequestered. There is no suggestion in the record, whatsoever, that the jury was exposed to any prejudicial publicity or improper contacts, as was asserted by Harvey (Tr. 1000).

The two cases cited by Harvey to support his argument that it was error not to sequester the jury

during the trial both hold, to the contrary, that it was not error to permit the jurors to go home, even during deliberations.* See United States v. Breland, 375 F.2d 721 (2d Cir. 1967); United States v. Tyler, 397 F.2d 565 (5th Cir. 1968), 394 U.S. 917 (1969). Accordingly, there is no factual or legal basis for Harvey's argument that it was error not to sequester the jury.

B. DISCOVERY OF NUTBROWN'S STATEMENT

Harvey argues that the District Court should have granted a mistrial, after the verdict was returned, because the District Court before trial did not order the Government to provide discovery of the statements of co-conspirators, including Byron Nutbrown. The District Court properly decided the discovery motions and, in any event, Harvey was in fact provided with discovery of Nutbrown's statement.

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*The jurors who found Harvey guilty were, by contrast, in the custody of the U.S. Marshal during the entire 5 1/2 hours of their deliberations and intervening meal (Tr. 991).

As part of his discovery motions, Harvey requested the Court to compel the Government to produce statements of all co-conspirators (R. 15). The Government responded by furnishing each defendant, Dunham and Harvey, with a copy of his own statement and declining to furnish copies of statements of witnesses, like George Kiblin, on the ground that production of such statements is governed by 18 U.S.C. §3500 (R. 22).

At the hearing on the motions on September 16, 1974, Harvey specifically requested the statement of Byron Nutbrown III, who was identified in the Government's Bill of Particulars as a co-conspirator in Count I (R. 21; R. 50, p. 30 - 31).

The Government acknowledged that production of Nutbrown's statement was not governed by 18 U.S.C. §3500, but urged the District Court to defer ruling on the production of Nutbrown's statements until the argument on September 20, 1974 of the motions to dismiss Count VI, the civil rights conspiracy count to which Nutbrown's statements were relevant (see Point I, supra). The Court agreed to defer decision as suggested.*

---

* Harvey's Brief (DB 26) suggests that the District Court denied production of Nutbrown's statement based on 18 U.S.C. §3500, but a closer examination of the transcripts reveals that the Court's decision was based on Rule 16(b). (Compare R. 50, p. 31 - 32 with R. 55, p. 3).

On September 20, 1974, before the hearing, the Government filed a Memorandum in Opposition to Motion to Dismiss Count VI, in which the basic facts of the Newport, New Hampshire burglary and summaries of Nutbrown's statement were set forth (R. 25). Thus, both the Court and counsel were aware of the substance of Nutbrown's statement when the Court finally ruled. In addition, on October 21, 1974, before the trial commenced, Nutbrown's statement to the Newport, New Hampshire police (GX 5) and a summary contained in a Trial Memorandum in support of its admission (R. 32) were received by Harvey's counsel. (A signed receipt for the statement and other 3500 material is annexed).

The discretion vested in the District Court in deciding discovery motions is reviewable only if it is abused. United States v. Cole, 453 F.2d 902, 904 (8th Cir.), cert. denied, 406 U.S. 922 (1972). The charges against Harvey involved the murder of a witness against him. Certainly, the District Court did not abuse its discretion when it exercised caution in disclosing information which would have revealed the names of other Government witnesses. If the Court had ordered discovery of all Nutbrown's statements Harvey would have known that Mrs. Nutbrown, the victim's mother, and Gary Jacobs, a 15-year-old friend, in addition to several law enforcement officers, were all potential witnesses (Tr. 531).

C. MRS. NUTBROWN'S POLYGRAPH EXAM

Harvey argues that a mistrial should have been granted when Mrs. Nutbrown, the victim's mother, in an answer to his counsel's hostile questions, mentioned that she had taken a polygraph examination on a matter unrelated to the issues in this case. The polygraph remark was totally innocuous and, in any event, Harvey waived his objection when he withdrew his request to strike the remark (Tr. 858).

Mrs. Nutborwn testified first during the Government's case to essentially uncontested facts. Harvey recalled her during his case, however, for the purpose of showing (1) that she had once had a fight with George Kiblin, and (2) that she had on another occasion given information to law enforcement officers leading to Harvey's conviction and was thus willing to "devise a scheme by which you could get Ernest Harvey" (Tr. 848).* Harvey's counsel asked Mrs. Nutbrown a series of questions pertaining to some unrelated stolen property. The following exchange occurred (Tr. 857):

> Q. Okay, but you were ready to lie if you had to?
>
> A. No, I couldn't do it to him. I wanted him arrested, yes, but I couldn't do it to him.
>
> Q. But you never said . . .
>
> A. I told him the truth, and I went down and took a polygraph, and they asked me if I was lying and I told them the truth.

---

* The apparent theory of this proof was to raise the possibility that Mrs. Nutbrown had engineered the death of her son in order to frame Harvey.

Clearly, Harvey opened the door by the questions suggesting Mrs. Nutbrown was lying. Moreover, the polygraph examination had no apparent relationship to the issues on trial. Thus, the cases cited by Harvey are inapposite and the motion for a mistrial was properly denied.

POINT V

THERE WAS OVERWHELMING EVIDENCE TO SUPPORT THE FINDING THAT DYNAMITE WAS TRANSPORTED INTERSTATE; IN ANY EVENT, HARVEY'S CONCURRENT SENTENCES ON COUNTS II THROUGH IV RENDER IT UNNECESSARY TO REACH THE QUESTION.

Harvey argues that there was insufficient evidence to support the jury's finding that the dynamite recovered in New Hampshire was transported interstate. The argument ignores the facts.

Harvey, Dunham and Nutbrown lived in the vicinity of Barre, Vermont, an area famous for the production of granite (Tr. 388). During a conversation in Vermont, Harvey told Kiblin that he had stolen the dynamite they used from a granite shed he broke into (Tr. 486). Numerous such thefts have occurred in the Barre area (Tr. 405).

During the telephone conversations in which plans for the lumberyard burglary were discussed, Harvey told Kiblin that he would bring enough firepower to blow the safe and would be down the next night (Tr. 464 - 466). Kiblin and the lumberyard were located in Newport, New Hampshire, approximately 100 miles south of Barre.

On the night of the burglary, at approximately 6:00 P.M., Mrs. Nutbrown took her son Byron to Harvey's

house in Barre and Harvey was there (Tr. 253). Three hours later, Harvey, Dunham and Nutbrown arrived in Newport, New Hampshire. Harvey had the dynamite with him in the trunk of the car together with the other burglary tools he brought (Tr. 467, 473). These included an ax or two, a sledge hammer, a crow bar, a piece of rope, an extension cord and an electric drill (Tr. 472 - 73).

On the basis of what Harvey told Kiblin, Kiblin had reason to believe that the dynamite was transported from Vermont (Tr. 605). Harvey, Dunham and Kiblin frequently discussed the fact that the dynamite had been transported interstate and the consequent federal charges (Tr. 489, 491 - 94, 499, 513 - 14).

Thus, the evidence of interstate transportation of dynamite, both direct and circumstantial, was substantial. The Court properly instructed the jury as to this element (Tr. 973 - 74), and the jury found this element from all the evidence in this case.

In any event, only Counts II and III contain the element of interstate transportation. Count IV, which relates to stolen dynamite, does not require that the dynamite be transported interstate. See Title 18, U.S.C. §842(h). Count I, the general conspiracy count, charges three

objects: (1) the interstate transportation of the proceeds of the burglary; (2) the receipt and concealment of stolen dynamite; and (3) the interstate transportation of dynamite with the intent to destroy property. Thus, two of the three objects of the conspiracy do not require proof that the dynamite be transported interstate and thus the challenge to the conspiracy count must fail.

The sentences on Counts II and III were concurrent with that imposed on Count IV. Consequently, even if Counts II and III were reversed, Harvey's sentences would be the same. Accordingly, this Court need not reach the question of sufficiency of evidence with respect to interstate transportation of dynamite. Barnes v. United States, 412 U.S. 837, 848 n. 16 (1973); United States v. Gaines, 460 F.2d 176 (2d Cir. 1972). But cf., United States v. Papadakis, 509 F.2d 287 (2d Cir. 1975)(involving concurrent sentences on convictions in different cases where substantial collateral consequences could result from the challenged conviction).

Harvey's argument on this point has no bearing whatsoever with respect to Count VI. Nutbrown's statements clearly were relevant to possible federal violations. It is immaterial whether or not his statements by themselves

established federal crimes or whether there was enough proof of such crimes, independent of his statements. He was still killed to keep him from giving information relevant to federal crimes.

Finally, Harvey argues that his admission to Kiblin that the dynamite was stolen is insufficient to establish that fact. The argument is frivolous. An officer from the Barre Town Police Department testified to numerous dynamite thefts in the area and Harvey, because of his previous felony conviction, could not obtain dynamite legally. Even assuming that the requirement that a confession be corroborated applies to an admission by a defendant during the commission of a crime, that requirement was fulfilled in this case. See United States v. Braverman, 376 F.2d 249, 253 (2d Cir.), cert. denied, 389 U.S. 885 (1967); Wong Sun v. United States, 371 U.S. 471, 489 n. 15 (1963). The proof showed that Harvey possessed dynamite which he said was stolen under circumstances which made it virtually certain that it was. Certainly, such proof was enough to satisfy this single element of Count IV.

Accordingly, the District Court properly denied the motions for acquittal.

CONCLUSION

The conviction of Ernest Harvey, Jr. on all counts should be affirmed.

Respectfully submitted,

GEORGE W. F. COOK
United States Attorney for
the District of Vermont,
Attorney for the United
States of America

WILLIAM B. GRAY
Assistant United States Attorney

June 30, 1975

VOLUNTARY STATEMENT

DATE 8/4/73 PLACE Newport Police Dept. TIME STARTED 2:45 am M.

BYRON NUTBROWN III, am 15 years old. My date of birth is 7/11/58

live at 27 1/2 Granite St. Barre, Vt.

he person to whom I give the following voluntary statement, Thomas Mynczywor

aving identified and made himself known as a police officer

GOVERNMENT EXHIBIT

ULY WARNED AND ADVISED ME, AND I KNOW:

1. That I have the right to remain silent and not make any statement at all, nor incriminate myself in any manner whatsoever.
2. That anything I say can and will be used against me in a court or courts of law for the offense or offenses concerning which this statement is herein made.
3. That I can hire a lawyer of my own choice to be present and advise me before and during this statement.
4. That if I am unable to hire a lawyer I can request and receive appointment of a lawyer by the proper authority, without cost or charge to me, to be present and advise me before and during this statement.
5. That I can refuse to answer any questions or stop giving this statement any time I want to.
6. That no law enforcement officer can prompt me what to say in this statement, nor write it out for me unless I choose for him to do so.

A. No one denied me of any of my rights, threatened or mistreated me, either by word or act, to force me to make known the facts in this statement. No one gave, offered or promised me anything whatsoever to make known the facts in this statement, which I give voluntarily of my own free will and accord.

B. I do not want to talk to a lawyer before or during the time I give the following true facts, and I knowingly and purposely waive my right to the advice and presence of a lawyer before and during this statement.

C. I certify that no attempt was made by any law enforcement officer to prompt me what to say, nor was I refused any request that the statement be stopped, nor at anytime during this statement did I request for the presence or advice of a lawyer.

I have read each page of this statement consisting of 1 pages, each page of which bears my signature, and corrections, if any, bear my initials, and I certify that the facts contained herein are true and correct.

This statement was completed at 3:10am M. on the 4th day of Aug. 19 73

WITNESS: Thomas J. Mynczywor

WITNESS: Wm. A. Massey

Byron Nutbrown
Signature of person giving voluntary statement.

Form 107 (280-6-71)

ATEMENT OF: Date 8/4/73 Page No. I

BYRON NUTBROWN III dob 7/II/58 27 I/2 Granite St. Barre, Vt.

At about 6pm on 8/3/73 I went to see Ernie Harvey at his house on Church St in Barre, Vt I went to see him because were good friends. There I also met Gary Dunham. Ernie asked me if I wanted to go for a ride to N.H. with him. I said yes and we left with Gary at about 8:40pm/ Ernie drove to N.H. and picked up George Kiplin at about IO:I5pm.

We went to a gas station and George bought cigarettes and a six pack of beer. Maybe Petco. From there we went to the A & W then we went up to the gravel pit and they looked around. Then Gary started driving and drove down to the lumber place.

We all got out across the street from the lumber place and they started to talk about cutting the wires and going into the place. This is the first time I heared them talk about going into someplace. No one said anything coming from Vermont. Or when we picked up Geprge. Ernie and George crossed the street to the lumber yard with Ernie carring the sack with a bar. They asked me to stay by the side of the road and watch for the police. Then they ran along side of the fence along the river to the back of the place. And Gary drove off.

They said that Gary was to keep the car out of sight and come back in a couple of hours.

After Gary left I stood there for a few minutes and then I started running down the side of the road towards town. I stopped alot and fell asleep in the bushes. Then I woke up and started down the road again when I saw a guy drive into his yard in front of his house and into his house. I went up and knocked on the door and asked to use the phone to call my mother in Barre. He asked what was the matter and I told him and then he called the police.

Byron Nutbrown III

Form 118 (809-8-71)

United States Department of Justice

UNITED STATES ATTORNEY
DISTRICT OF VERMONT
RUTLAND, VERMONT 05701

OCTOBER 21, 1974

I have received from the United States Attorney's office the following documents for use during cross-examination, and agree to return them to the United States Attorney after the witness has concluded his testimony:

F.B.I. reports of Officer Thomas MYNCZWOR and Michael PATTEN. (5 pages)

Newport Police Dept. - Newport, N.H. VOLUNTARY STATEMENT of Byron Nutbrown III. (2 pages)

Grand Jury testimony of Officers Thomas MYNCZWOR and Michael PATTEN. (24 pages)

Report of Officer Thomas MYNCZWOR (2 pages)

I Don't understand to authenticity of [illegible]

BENNETT E. GREENE, ESQ.
Attorney for Defendant Harvey

APP. 3

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

ERNEST HARVEY, JR.,

Appellant

CERTIFICATE OF SERVICE

I, William B. Gray, Assistant United States Attorney for the District of Vermont, do hereby certify that I served two copies of the foregoing BRIEF FOR THE UNITED STATES upon the Appellant by mailing same to his attorney of record, Bennett E. Greene, Esq., 192 College Street, Burlington, Vermont 05401 this 2nd day of July, 1975.

William B. Gray

WILLIAM B. GRAY
Assistant U.S. Attorney

BENNETT EVANS GREENE
ATTORNEY AT LAW
192 COLLEGE STREET
BURLINGTON, VERMONT 05401
AREA CODE 802-864-6870

May 30, 1975

Hon. A. Daniel Fusaro, Clerk
U.S. Court of Appeal
Second Circuit
U.S. Court Building
Foley Square
New York, New York 10007

RE: United States of America
VS: Ernest Harvey, Jr.
Second Circuit Docket No. 75-1053

Dear Mr. Fusaro:

This letter is attached to a package containing seven copies of appellant's brief and appellant's appendices A - E in regard to the above captioned matter.

The package contains seven accordion file folders, each containing one copy of each item.

Also, on this date I have forwarded to Hon. George W.F. Cook, U.S. Attorney for the district of Vermont, copies of all of the above mentioned items and this letter.

Sincerely,

Bennett E. Greene

BG:ls

Enclosures

6/2/75 ph
called Mr. Greene about brief and appendix not conforming with FRAP he is going to send in motion either to file in its present form or extension of time to file proper briefs + appendix in tuck